No. 14038.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RONALD J. CORRIGAN,

Appellant,

vs.

SECRETARY OF THE ARMY, *et al.*,

Appellees.

APPELLEES' REPLY BRIEF.

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Statement of the Case.

The facts of this case are very clear-cut by the Appellant's own admissions. It appears that the Appellant Corrigan was summoned by his Selective Service Board to report for induction on April 15, 1953. Prior to that time he had never claimed to be a Conscientious Objector [Tr. 49]. In fact, prior to the time of his induction, he had been a member of the Enlisted Reserves of the United States Army [Tr. 51]. On the morning of April 15, 1952, Corrigan appeared at the Induction Station at approximately 9:00 o'clock in the morning. In the following three to four hours Corrigan took a physical examination and was interviewed by a Sergeant Castaneda. Corrigan admits that when Castaneda asked him if he had ever been a Conscientious Objector, he replied "No" [Tr. 53]. Sergeant Castaneda likewise testified that on the morning in question he made no report to his supe-

riors of any Conscientious Objectors appearing in his interviews [Tr. 27].

By Corrigan's own admission he became a Conscientious Objector while sitting in the room at the Induction Station [Tr. 49]. It appears, therefore, that he suddenly sought to claim exemption as a Conscientious Objector when he became conscious of the fact that the swearing in proceedings were ending.

Captain Beydler testified that Corrigan's name was called along with others on the roster [Tr. 17] after the individuals in the room were advised that the induction was about to begin. Beydler testified that he heard responses to every name called [Tr. 17]. Corrigan admitted that he replied "Here" when his name was called [Tr. 50] and that he made no objection to induction at that time [Tr. 50].

Corrigan stood up with the other inductees present but claimed that he did not "step forward." He admits that due to the congested conditions in the room many of the other inductees merely shuffled their feet or did nothing when told to step forward [Tr. 28].

Argument.

All of the issues set forth in the four Specifications of Error urged by the Appellant in this case can actually be treated as one simple issue. This issue involves a question of fact rather than law. That issue is, did Corrigan so conduct himself as to meet the procedural requirements for induction, including the "stepping forward" provided in Section 23, Paragraph 23 of Special Regulation No. 615-180-1 issued by the Department of the Army on 10 April 1953.

The court below found as a question of fact that Corrigan responded to his name and took one step forward [Tr. 23]. This finding of fact may not be upset upon appeal except upon a showing that it was based upon no evidence whatsoever. Such is not the case here. While Corrigan denies that he "stepped forward" he admits to participating in every other step in the induction proceedings except that one physical act. His other actions are totally inconsistent with his claim that he did not "step forward." By his own admission he had never claimed to be a Conscientious Objector and even on that particular date had made no claim that he was a Conscientious Objector when interviewed. Furthermore, he went through three or four hours of induction preliminaries, took his place in the induction room, and heard the inducting officer inform him of the imminence of the induction. After being advised "You will take one step forward as your name and service are called and such step will constitute your induction into the armed service indicated," he responded when his name was called but says that he did not move his feet. His actions, however, belie that statement.

If we were to adopt the theory of the Appellant in this case, it would become absolutely necessary that every individual being inducted into the armed forces of the United States would have to step out in plain sight where the inducting officer could watch to see if he moved his feet. Otherwise, any of the inductees could claim, like Corrigan now claims, that although he did everything else required for induction, he did not move his feet, and therefore he had not been inducted. This would make the present induction process absurd.

There is one additional very vital factor involved here. When Corrigan responded to the calling of his name, he made no protest to his being inducted. While the inducting officer could not see him move his feet because of the crowded room, the inducting officer could have heard Corrigan had he made any protest. By Corrigan's own admission, however, he made no such protest. Under the circumstances the court below could hardly do anything other than resolve the factual issue against the Appellant Corrigan.

The Appellant makes a point of the fact that the Court commented from the bench [Tr. 63] that the Appellant made up his mind too late. Appellant then contends that a selectee can make up his mind during the last split second. However, the evidence here indicates that the Appellant made up his mind after the induction was an accomplished fact even though it might have been only a matter of moments after that event.

The gist of the Appellant's theory in this case is that he is entitled to be tried as a draft dodger in the criminal courts of the United States rather than tried as a deserter in the military courts. That hardly seems to be a reasonable or equitable grounds for giving this Appellant any special consideration.

Conclusion.

It is respectfully submitted that there is no legal issue involved here and for that reason no legal authorities, other than the pertinent regulation, are cited. The issue is one of fact. As an issue of fact, an appellate court should not upset a finding of the lower court unless there is a total absence of evidence to support that finding. Such is not the case here. The inducting officer, and the court below, had every reason to believe that Corrigan had submitted to induction into the armed forces. Under those circumstances, the finding of the court below should not be disturbed.

Respectfully submitted,

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